

E-FILED on May 30, 2006

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Attorneys for Debtors and Debtors-in-Possession

**UNITED STATES BANKRUPTCY COURT  
 DISTRICT OF NEVADA**

In re:  
 USA COMMERCIAL MORTGAGE COMPANY,  
 Debtor.

In re:  
 USA CAPITAL REALTY ADVISORS, LLC,  
 Debtor.

In re:  
 USA CAPITAL DIVERSIFIED TRUST DEED FUND, LLC,  
 Debtor.

In re:  
 USA CAPITAL FIRST TRUST DEED FUND, LLC,  
 Debtor.

In re:  
 USA SECURITIES, LLC,  
 Debtor.

Affects:  
☒ All Debtors  
☐ USA Commercial Mortgage Company  
☐ USA Securities, LLC  
☐ USA Capital Realty Advisors, LLC  
☐ USA Capital Diversified Trust Deed Fund, LLC  
☐ USA First Trust Deed Fund, LLC

Case No. BK-S-06-10725 LBR  
 Case No. BK-S-06-10726 LBR  
 Case No. BK-S-06-10727 LBR  
 Case No. BK-S-06-10728 LBR  
 Case No. BK-S-06-10729 LBR

Chapter 11

Jointly Administered Under  
 Case No. BK-S-06-10725 LBR

**MOTION FOR ORDER APPROVING  
 CONTINUED USE OF CASH THROUGH  
 JULY 29, 2006 PURSUANT TO SECOND  
 REVISED BUDGET**

(AFFECTS ALL DEBTORS)

Date: June 21, 2006  
 Time: 9:30 a.m.

1 USA Commercial Mortgage Company (“USA”), USA Securities, LLC, USA Capital  
 2 Realty Advisors, LLC, USA Capital Diversified Trust Deed Fund, LLC, and USA Capital First  
 3 Trust Deed Fund, LLC (collectively, the “Debtors”) hereby move the Court for an order approving  
 4 the Debtors’ continued use of cash through the week ending July 29, 2006, pursuant to a second  
 5 revised cash budget which the Debtors will file on or before June 5, 2006.

## 6 POINTS AND AUTHORITIES

### 7 Facts

8 1. The Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy  
 9 Code on April 13, 2006. By order entered June 9, 2006, the Court approved the joint  
 10 administration of the Debtors’ bankruptcy cases.

11 2. On April 14, 2006, the Debtors filed their Motion for Order Approving Debtors’  
 12 Proposed Cash Management Procedures and Interim Use of Cash (the “Cash Motion”), attached  
 13 hereto as **Exhibit “1”**, which sought, among other things, approval of the Debtors’ limited use of  
 14 cash for a limited 90-day period, through approximately July 15, 2006, as set forth in the cash  
 15 budget (the “Initial Budget”) attached as Exhibit A to the Cash Motion.

16 3. On April 19, 2006, the Court entered an Interim Order approving the Cash Motion  
 17 and the Debtors’ interim use of cash for the purposes and on the terms set forth in the Cash Motion  
 18 and the Initial Budget until May 3, 2006, when the Cash Motion was to be considered further at a  
 19 hearing.

20 4. Several objections to the Cash Motion were filed on or before the May 3, 2006  
 21 hearing date.

22 5. On May 2, 2006, the Debtors filed a Reply Brief (the “Reply”), attached hereto as  
 23 **Exhibit “2”** and a Supplemental Declaration of Thomas J. Allison (the “Supplemental  
 24 Declaration”), attached as **Exhibit “3”**, in support of the Motion, including a revised cash budget  
 25 (the “First Revised Budget”) attached as Exhibit B to the Supplemental Declaration.

26 6. At the May 3, 2006 hearing, the Court approved the Cash Motion and the limited  
 27 use of cash to the extent and for the purposes reflected in the First Revised Budget through July  
 28 16, 2006. The Court’s order granting this relief was entered on May 22, 2006 (the “Cash Usage

Order”).

7. Although the Debtors’ authority to use cash pursuant to the Cash Usage Order presently expires on July 16, 2006, the Debtors will have a continuing need to use cash beyond that date to complete the loan and investor account reconciliations and analyses, and the other important administrative tasks they are performing, as described in the Cash Motion, the Reply, and the Supplemental Declaration. Future hearings in the Debtors cases have been set for June 5, 2006, June 21, 2006, and July 25, 2006, and the Debtors understand that the Court is not available to conduct any hearings in these cases between June 21, 2006 and July 25, 2006. Therefore, in order for the Debtors to have authority to use cash after July 16, 2006 and through the next available hearing date of July 25, 2006 hearing,<sup>1</sup> the Debtors request that the Court approve the additional use of cash to the extent and for the purposes set forth in the second revised budget (the “Second Revised Budget”) which the Debtors will file on or before June 5, 2006.

8. The Initial Budget and the Revised Budget contemplated that only one official committee would be formed in the Debtors’ cases. Subsequently, however, four separate official committees have been appointed in these cases, and although it first appeared that three of the committees intended to share one set of professionals, it now appears that each of the four committees intends to hire its own separate professionals. Thus, with four separate committees and separate sets of professionals serving each committee, the administrative costs that the Debtors’ estates must bear will be substantially increased and the Debtors will need to substantially revise various aspects of their cash budget for the coming weeks. Therefore, although the Debtors need to file this motion at this time to ensure that it will be heard on June 21, 2006, the Debtors have not yet completed their work on the Second Revised Budget and will file it by no later than June 5, 2006.

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<sup>1</sup> This motion requests authority to use cash through the week ending July 29, 2006, to provide a few extra days after the July 25, 2006 hearing to allow for the entry of any order respecting further cash usage that may be entered based on the Court’s rulings at the July 25, 2006 hearing. July 25, 2006 is also the hearing at which the Court will consider the continued employment of Thomas Allison, Mesirow Financial and Debtors’ counsel.

1 **MEMORANDUM OF LAW**

2 The legal basis for the present motion is set forth in the Cash Motion, the Reply, the  
3 Supplemental Declaration, and also in other documents on file with the Court, including USA's  
4 Motion to Temporarily Hold Funds Pending a Determination of the Proper Recipients ("Motion to  
5 Hold Funds") attached hereto as **Exhibit "4"** and filed May 8, 2006, which are documents  
6 incorporated herein by reference. As with the original Cash Motion, this motion seeks only  
7 permission to use funds the Debtors are contractually entitled to collect and use. The Debtors are  
8 not seeking permission to use any funds being held in the separate DIP Investor Account, and are  
9 only seeking to use funds in the separate DIP Collection Account to the extent approved by the  
10 Court and to the extent that Debtors have contractual rights to collect servicing fees and other fees  
11 and costs.

12 **CONCLUSION**

13 WHEREFORE, the Debtors respectfully request that Court approve the continuing use of  
14 cash in the Debtors' estates through the week ending July 29, 2006, to the extent and for the  
15 purposes set forth in the Second Revised Budget to be filed by the Debtors by June 5, 2006.

16 Respectfully submitted this 30th day of May, 2006.

17 /s/ *LENARD E. SCHWARTZER*

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23 and

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# **EXHIBIT “1”**

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**UNITED STATES BANKRUPTCY COURT  
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In re:  
 USA SECURITIES, LLC,  
 Debtor.

**Affects:**

- ☒ All Debtors  
☐ USA Commercial Mortgage Company  
☐ USA Securities, LLC  
☐ USA Capital Realty Advisors, LLC  
☐ USA Capital Diversified Trust Deed Fund, LLC  
☐ USA First Trust Deed Fund, LLC

**MOTION FOR ORDER UNDER  
 11 U.S.C. §§ 105(a), 345, AND 363  
 APPROVING DEBTORS'  
 PROPOSED CASH MANAGEMENT  
 PROCEDURES AND INTERIM USE  
 OF CASH IN ACCORDANCE  
 WITH PROPOSED CASH BUDGET**

Date:

Time:

USA Commercial Mortgage Company (“USACM”), on behalf of itself and its affiliated debtors, which are USA Securities, LLC (“USAS”), USA Capital Realty Advisors, LLC (“USARA”), USA Capital Diversified Trust Deed Fund, LLC (“Diversified Fund”), and USA Capital First Trust Deed Fund, LLC (“First Deed Fund”) (collectively, the “Debtors”), hereby moves the Court for an order under 11 U.S.C. §§ 105(a), 345, and 363 approving the Debtors’ proposed cash management procedures and interim use of cash in accordance with the proposed cash budget for the first 90 days of this case, which budget is attached hereto as **Exhibit A**. This Motion seeks immediate entry of an order approving cash management procedures and the use of cash for the later of the first 7 days of the case or until a hearing on interim use of cash is held and, after notice and a hearing, a further order approving the cash management procedures and the use of cash for the first 90 days of the case. In support of this Motion, USACM represents as follows:

### FACTUAL BACKGROUND

1. The Declaration of Thomas J. Allison (“Allison”) provides background information concerning the Debtors, their current status and problems (including substantial commingling of funds, which is also discussed below), and the pressing need for the limited use of cash to preserve the value of the loan portfolio serviced by USACM for the benefit of all creditors of and investors in the Debtors as a unified enterprise.

2. Allison, who upon the filing of the bankruptcy petitions was installed as the new, independent management for each of the Debtors, now serves as the sole Manager of the four Debtors who are limited liability companies (USAS, USARA, Diversified Fund, and First Deed Fund), and as the president of the corporate debtor USACM, with full authority to oversee the restructuring and reorganization of the Debtors’ unified business enterprise. Prior to the petition date, Allison and other restructuring professionals from Mesirow Financial had an opportunity, although limited, to investigate the facts and circumstances surrounding the Debtors, their joint business enterprise, and their books and records. Therefore, although the representations and conclusions stated in this Motion and in the related papers filed herewith are of necessity preliminary in nature, the Debtors, acting through Allison as their new chief restructuring officer, strongly believe that the relief requested in this Motion is warranted and is in the best interest of

1 all parties in interest.

2 3. As of the bankruptcy petition date, USACM was the servicer for a loan portfolio of  
3 approximately 100 open commercial mortgage loans (the "Loan Portfolio"). A substantial portion  
4 of the loans in the Loan Portfolio have been divided into fractionalized shares that are held by  
5 many different noteholders. The noteholders of the loans in the Loan Portfolio fall into three main  
6 categories: (1) Diversified Fund holds a 100% interest in some of the loans, and only  
7 fractionalized shares in some others; (2) First Deed Fund holds a 100% interest in some of the  
8 loans, and only fractionalized shares in some others; and (3) various groups of individual investors  
9 hold 100% interests in some of the loans, and only fractionalized shares in many others. Of the  
10 approximately 100 loans in the Loan Portfolio, approximately 20 are owned 100% by Diversified  
11 Fund and/or First Deed Fund (collectively, the "Funds"), approximately 30 others are owned  
12 100% by various groups of investors not including the Funds, and the remaining approximately 50  
13 loans are held in fractional shares by one or both of the Funds along with various groups of  
14 individual investors.

15 4. There are approximately 1,900 members owning the membership interests in the  
16 Diversified Fund, approximately 1,300 members owning the membership interests in the First  
17 Deed Fund, and approximately 3,600 direct investors (other than the Funds) who own fractional  
18 shares of various loans in the Loan Portfolio, with substantial overlap among the members of the  
19 Funds and the individual investors holding direct investments in loans within the Loan Portfolio.  
20 In other words, a substantial number of the 3,600 individual investors who directly hold the  
21 portions of the Loan Portfolio that are not owned by either of the Funds are the same individuals  
22 who also invested indirectly in the Loan Portfolio by purchasing membership interests in one or  
23 both of the Funds.

24 5. Prior to April 2006, the individual holders of the direct interests in the notes in the  
25 Loan Portfolio and the individual owners of the membership interests in the Funds (collectively,  
26 the "Investors"), received interest payments from the Debtors each month—whether or not the  
27 interest payments had been collected from the borrowers on the loans in the Loan Portfolio.  
28 Furthermore, it appears that when borrowers paid down principal or paid off loans within the Loan



1 Portfolio, the principal payments received by USACM as loan servicer were not returned to the  
2 borrowers but were held and used in some cases to fund interest payments to Investors holding  
3 interests in non-performing loans.

4 6. Based on payments made to Investors whether or not they were entitled to receive  
5 payments, and based on loans being paid off and collateral being released without the loan-payoff  
6 amounts being remitted to Investors, many or most of the Investors probably owe money to or are  
7 owed money by the Debtors, or both. However, because the Debtors' financial records did not  
8 accurately match the receipts of loan payments and disbursements of funds to Investors, and  
9 because funds were commingled in various accounts, it is difficult to determine the actual amounts  
10 owed to and/or owed by each Investor. Under new management, the Debtors believe that the cash  
11 management procedures proposed in this Motion affords the Debtors the best chance of sorting out  
12 these issues as quickly as possible under the circumstances, and of preserving the value of the  
13 Loan Portfolio for the benefit of all Investors.

14 7. Some of the loans in the Loan Portfolio are construction and/or development loans  
15 in which there are ongoing funding commitments. If remaining committed amounts are not  
16 funded for these loans, collecting the outstanding loan balance on these loans for the benefit of  
17 Investors may become much more difficult. It appears that such loans are held in the portion of  
18 the Loan Portfolio held by the Funds as well as in the portion held only by the direct Investors.

19 8. It appears that non-performing loans exist in the portion of the Loan Portfolio held  
20 by the Funds as well as in the portion held only by the direct Investors. Limited collection activity  
21 appears to have taken place on these non-performing loans. Collecting the outstanding interest  
22 and matured principal is a top priority in preserving value for all Investors.

23 9. It appears that prior to April 2006, USACM as servicer for the entire Loan Portfolio  
24 did not carefully distinguish between the loans that were held directly by the Funds and the loans  
25 in which the Funds had no interest. USACM and the other Debtors apparently treated all Investors  
26 and the entire Loan Portfolio as if they were part of a single business enterprise.

27 10. As servicer for the entire Loan Portfolio, USACM was contractually entitled to  
28 collect a serving fee from the incoming loan payments, but apparently did not regularly collect the

1 fee.

2 11. Although separate bank accounts exist for each of the five Debtors, funds received  
3 by the Debtors from interest, loan payments and loan payoffs were commingled primarily into a  
4 "Collection Trust Account" held in the name of USACM, and funds from this bank account were  
5 used to make monthly interest payments to Investors as well as to fund the ongoing operations and  
6 overhead of the Debtors' joint business enterprise. The separate bank accounts of the Funds were  
7 used as disbursement vehicles for interest payments to the Fund investors. USACM maintains  
8 operational bank accounts for operating expenses, loan closings and other business purposes. The  
9 bank accounts of the other Debtors were rarely used. A list of bank accounts is attached as **Exhibit**  
10 **B. Exhibit C** is a diagram which shows how the Debtors used a collection account and an  
11 investor account to collect from all borrowers no matter which party had made the loan and no  
12 matter which entity was making the loans.

### 13 PROPOSED CASH MANAGEMENT PROCEDURES

14 In order to preserve the value of the Loan Portfolio for the benefit of all Investors, and to  
15 provide the Debtors, which are under new management, with a limited period of time and limited  
16 funds to promptly investigate and sort out the issues that need to be immediately addressed  
17 relating to the Loan Portfolio and the accounts of each of the Investors, the Debtors proposed the  
18 following cash management procedures:

19 a. The Debtors will establish a new, Debtor-In-Possession bank account (the "DIP  
20 Collection Account") at Wells Fargo Bank that will have the ability to accept "lock-box"  
21 payments from the borrows on the loans within the Loan Portfolio (the "Borrowers").

22 b. The Debtors will maintain the so-called "Collection Trust Account" of USACM at  
23 Wells Fargo Bank (the "Collection Account") to facilitate the continuing receipt of wire transfer  
24 payments from the Borrowers. This account receives all interest and principal payments from the  
25 loans for which USACM serves as servicing agent. Most of these payments are made  
26 electronically by the borrowers. Closing this account would require all borrowers to alter or  
27 modify their wiring instructions which could result in delays in expected cash flow, as well as  
28 miscommunication on the application of funds received. Loan Payments, loan payoffs, and all

1 other amounts existing or received into the Collection Account will be transferred promptly to the  
 2 DIP Collection Account. As of the petition date, Wells Fargo will be instructed to reject all  
 3 checks, wires and ACHs presented for payment from this account and the Debtors will cease all  
 4 electronic payments from this account.

5 c. The Debtors will maintain detailed records concerning the source (including  
 6 identification of the specific borrow and specific loan to which the payment relates, if applicable)  
 7 of each payment coming into the Collection Account and the DIP Collection Account.

8 d. USACM maintains an operating account at Wells Fargo Bank from which ADP  
 9 will draw the necessary payroll funds on April 17. In addition, that account is set up to receive  
 10 certain wire transfers. While the Debtors will open a separate "DIP Operating Account" from  
 11 which the business and administrative expenses of the Debtors will be paid, it will not be possible  
 12 to transfer the ADP ACH payment to a new account prior to the payroll date. Accordingly, the  
 13 Debtors request permission to allow existing operating account at Wells Fargo to remain open,  
 14 with instructions to the bank to refuse to honor checks, and allow the deposit of funds for this  
 15 current payroll cycle and the ACH withdrawal by ADP. It is anticipated that the transfer of ADP  
 16 instructions to the DIP Operating Account will be completed before the following payroll cycle,  
 17 allowing the closure of the existing operating account.

18 e. All other bank accounts that exist in the name of any of the Debtors will be closed,  
 19 and the funds will be transferred to a respective DIP Account, so that each Debtor maintains a DIP  
 20 account. The only bank accounts which are anticipated to have funds for these Debtors will be the  
 21 DIP Collection Account, the Collection Account, and the DIP Operating Account (collectively the  
 22 "DIP Accounts").

23 f. The aggregate amount of the line items in the cash budget attached hereto as  
 24 **Exhibit A** (the "Budget") for each week will be transferred from the DIP Collection Account to  
 25 the DIP Operating Account, to be used only for payment of the expenses and costs set forth in the  
 26 Budget to the extent approved by the Court. The Budget anticipates that operating expenses will  
 27 be required in order to (a) continue servicing the loan portfolio; (b) analyze and investigate the  
 28 amounts owed to or from each Investor; (c) collect amounts due from borrowers including

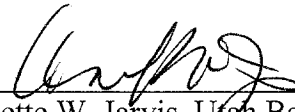
1 commencing foreclosure proceedings or other collection expenses. These necessary activities will  
2 inure to the benefit of all Investors in maintaining the value of the Loan Portfolio and in  
3 determining the proper amounts due to and from all Investors.

4 g. All rights, if any, of the Investors, including indirect rights as members of the  
5 Funds and direct rights as holders of other notes (or fractional interests in notes) in the Loan  
6 Portfolio or in the proceeds thereof will attach to the DIP Accounts except that the amounts in the  
7 Court-approved budget may be transferred to the DIP Operating Account as set forth above for the  
8 benefit of all Investors.

### 9 CONCLUSION

10 Based on the foregoing, the Debtors respectfully request this Court to approve the Debtors'  
11 proposed cash management procedures and interim use of cash in accordance with the proposed  
12 budget, for such purposes and on such terms as set forth herein.

13 Respectfully submitted this 14 day of April, 2006.

14   
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# **EXHIBIT A**

USA Commercial Mortgage Company, et al.  
13-Week Cash Forecast  
(\$ in thousands)

13-Week Cash Forecast

	4/22/2006	4/29/2006	5/6/2006	5/13/2006	5/20/2006	5/27/2006	6/3/2006	6/10/2006	6/17/2006	6/24/2006	7/1/2006	7/8/2006	7/15/2006
<b>Cash Receipts</b>													
USA Commercial Mortgage - Wells Fargo													
Loan Closing Fees	\$0.0	\$0.0	\$0.0	\$0.0	\$0.0	\$0.0	\$0.0	\$0.0	\$0.0	\$0.0	\$900.0	\$0.0	\$0.0
Extension Fees	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Total Other Income	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	26.6	0.0	0.0
<b>Total Cash Receipts (USACMC - Wells Fargo)</b>	<b>\$0.0</b>	<b>\$0.0</b>	<b>\$0.0</b>	<b>\$0.0</b>	<b>\$0.0</b>	<b>\$0.0</b>	<b>\$0.0</b>	<b>\$0.0</b>	<b>\$0.0</b>	<b>\$0.0</b>	<b>\$926.6</b>	<b>\$0.0</b>	<b>\$0.0</b>
USA Commercial Mortgage - LaSalle													
Loan Closing Fees - Perm	\$25.0	\$0.0	\$7.0	\$0.0	\$0.0	\$0.0	\$0.0	\$0.0	\$0.0	\$0.0	\$0.0	\$0.0	\$0.0
Appraisal revenue - Perm	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
<b>Total Cash Receipts (USACMC - LaSalle)</b>	<b>\$25.0</b>	<b>\$0.0</b>	<b>\$7.0</b>	<b>\$0.0</b>	<b>\$0.0</b>	<b>\$0.0</b>	<b>\$0.0</b>	<b>\$0.0</b>	<b>\$0.0</b>	<b>\$0.0</b>	<b>\$0.0</b>	<b>\$0.0</b>	<b>\$0.0</b>
<b>Collections Trust Account</b>													
Estimated Interest Return	\$0.0	\$0.0	\$0.0	\$5,895.7	\$0.0	\$0.0	\$0.0	\$5,823.2	\$0.0	\$0.0	\$0.0	\$0.0	\$5,849.8
Expected Returned Principal	0.0	0.0	0.0	4,828.0	0.0	0.0	26,950.0	0.0	10,679.1	23,683.7	0.0	0.0	0.0
Expected Outstanding Fee Return	0.0	0.0	0.0	146.3	0.0	0.0	222.8	0.0	314.0	320.0	0.0	0.0	0.0
Expected Outstanding Interest Return	0.0	0.0	0.0	813.2	0.0	0.0	904.5	0.0	57.4	20.4	0.0	0.0	0.0
<b>Expected Cash Collections</b>	<b>\$0.0</b>	<b>\$0.0</b>	<b>\$0.0</b>	<b>\$11,683.2</b>	<b>\$0.0</b>	<b>\$0.0</b>	<b>\$28,077.2</b>	<b>\$5,823.2</b>	<b>\$11,050.6</b>	<b>\$24,024.1</b>	<b>\$0.0</b>	<b>\$0.0</b>	<b>\$5,849.8</b>
<b>Total Cash Receipts - Filed Entities</b>	<b>\$25.0</b>	<b>\$0.0</b>	<b>\$7.0</b>	<b>\$11,683.2</b>	<b>\$0.0</b>	<b>\$0.0</b>	<b>\$28,077.2</b>	<b>\$5,823.2</b>	<b>\$11,050.6</b>	<b>\$24,024.1</b>	<b>\$926.6</b>	<b>\$0.0</b>	<b>\$5,849.8</b>
<b>Cash Disbursements</b>													
USA Commercial Mortgage - Wells Fargo													
Total Selling Expense	\$0.0	\$0.0	\$0.0	\$0.0	\$0.0	\$0.0	\$0.0	\$0.0	\$0.0	\$0.0	\$6.9	\$0.0	\$0.0
Administrative Expenses													
Salaries & Wages	203.6	0.0	80.0	0.0	77.8	0.0	0.0	80.0	0.0	77.8	0.0	80.0	0.0
Payroll Related Benefits	14.5	0.0	27.9	0.0	14.5	0.0	13.4	14.5	0.0	14.5	13.4	14.5	0.0
Rent	0.0	0.0	57.1	0.0	0.0	0.0	57.1	0.0	0.0	0.0	57.1	0.0	0.0
Total Legal	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	3.9	3.9	3.9
Total Other Administrative Expenses	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0
<b>Total Administrative Expenses</b>	<b>\$258.0</b>	<b>\$40.0</b>	<b>\$205.0</b>	<b>\$40.0</b>	<b>\$132.3</b>	<b>\$40.0</b>	<b>\$110.5</b>	<b>\$134.5</b>	<b>\$40.0</b>	<b>\$136.2</b>	<b>\$114.4</b>	<b>\$138.4</b>	<b>\$43.9</b>
Total Other Expense	\$0.0	\$0.0	\$0.0	\$0.0	\$0.0	\$0.0	\$0.0	\$0.0	\$0.0	\$0.0	\$2.9	\$0.0	\$0.0
Total Cash Disbursements (USA CMC - Wells Fargo)	\$258.0	\$40.0	\$205.0	\$40.0	\$132.3	\$40.0	\$110.5	\$134.5	\$40.0	\$136.2	\$124.1	\$138.4	\$43.9
USA Capital Realty Advisors													
Marketing	\$3.7	\$3.7	\$3.7	\$3.7	\$3.7	\$3.7	\$3.7	\$3.7	\$3.7	\$3.7	\$3.7	\$3.7	\$3.7
Total Legal	5.7	5.7	5.7	5.7	5.7	5.7	5.7	5.7	5.7	5.7	5.7	5.7	5.7
Total Other	2.7	2.7	2.7	2.7	2.7	2.7	2.7	2.7	2.7	2.7	2.7	2.7	2.7
<b>Total Cash Disbursements (USA Capital Realty)</b>	<b>\$12.1</b>	<b>\$12.1</b>	<b>\$12.1</b>	<b>\$12.1</b>	<b>\$12.1</b>	<b>\$12.1</b>	<b>\$12.1</b>	<b>\$12.1</b>	<b>\$12.1</b>	<b>\$12.1</b>	<b>\$12.1</b>	<b>\$12.1</b>	<b>\$12.1</b>
<b>Total Cash Disbursements - Filed Entities</b>	<b>\$270.1</b>	<b>\$52.1</b>	<b>\$217.1</b>	<b>\$52.1</b>	<b>\$144.4</b>	<b>\$52.1</b>	<b>\$122.6</b>	<b>\$146.6</b>	<b>\$52.1</b>	<b>\$148.3</b>	<b>\$136.2</b>	<b>\$150.5</b>	<b>\$53.0</b>
<b>Net Change in Cash USA Commercial Mortgage Related Entities</b>													
Total Cash Receipts	\$25.0	\$0.0	\$7.0	\$11,683.2	\$0.0	\$0.0	\$28,077.2	\$5,823.2	\$11,050.6	\$24,024.1	\$926.6	\$0.0	\$5,849.8
Total Cash Disbursements	270.1	52.1	217.1	52.1	144.4	52.1	122.6	146.6	52.1	148.3	136.2	150.5	53.0
<b>Net Change in Cash Before Bankruptcy Related Fees</b>	<b>(\$245.1)</b>	<b>(\$52.1)</b>	<b>(\$210.1)</b>	<b>\$11,631.1</b>	<b>(\$144.4)</b>	<b>(\$52.1)</b>	<b>\$27,954.6</b>	<b>\$5,476.6</b>	<b>\$10,998.5</b>	<b>\$23,875.8</b>	<b>\$790.3</b>	<b>(\$150.5)</b>	<b>\$5,593.8</b>

USA Commercial Mortgage Company, et al.  
13-Week Cash Forecast  
(\$ in thousands)

13-Week Cash Forecast

	4/22/2006	4/29/2006	5/6/2006	5/13/2006	5/20/2006	5/27/2006	6/3/2006	6/10/2006	6/17/2006	6/24/2006	7/1/2006	7/8/2006	7/15/2006
	Week Ending												
<b>Bankruptcy Related Costs</b>													
Debtor Professional Fees													
Financial Advisor Fees & Expenses	\$160.6	\$160.6	\$151.8	\$148.8	\$145.9	\$119.8	\$119.8	\$119.8	\$119.8	\$119.8	\$119.8	\$119.8	\$119.8
Legal Counsel Fees & Expenses	50.0	50.0	50.0	50.0	50.0	50.0	50.0	50.0	50.0	50.0	50.0	50.0	50.0
Local Counsel	16.7	16.7	16.7	16.7	16.7	16.7	16.7	16.7	16.7	16.7	16.7	16.7	16.7
PR Firm	1.3	1.3	1.3	1.3	0.8	0.8	0.8	0.8	0.8	0.8	0.8	0.8	0.8
Other Professionals	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Committee Professionals													
Legal Counsel Fees & Expenses	0.0	0.0	0.0	25.0	25.0	25.0	25.0	25.0	25.0	25.0	25.0	25.0	25.0
Financial Advisor Fees & Expenses	0.0	0.0	0.0	25.0	25.0	25.0	25.0	25.0	25.0	25.0	25.0	25.0	25.0
<b>Total Bankruptcy Professional Fees</b>	<b>\$228.5</b>	<b>\$228.5</b>	<b>\$219.7</b>	<b>\$266.7</b>	<b>\$263.3</b>	<b>\$237.2</b>	<b>\$237.2</b>	<b>\$237.2</b>	<b>\$237.2</b>	<b>\$237.2</b>	<b>\$237.2</b>	<b>\$237.2</b>	<b>\$237.2</b>
Cash Payment for Bankruptcy Professional Fees	\$0.0	\$0.0	\$0.0	\$0.0	\$0.0	\$0.0	\$541.4	\$0.0	\$0.0	\$0.0	\$0.0	\$803.5	\$0.0
Other													
Employee Retention Costs	\$0.0	\$0.0	\$0.0	\$0.0	\$0.0	\$0.0	\$0.0	\$0.0	\$0.0	\$0.0	\$0.0	\$0.0	\$0.0
Noticing Agent	0.0	0.0	0.0	0.0	0.0	0.0	15.0	0.0	0.0	0.0	15.0	0.0	0.0
Other (security)	10.0	10.0	10.0	10.0	10.0	10.0	10.0	10.0	10.0	10.0	10.0	10.0	10.0
Post-Petition Financing													
Post-Petition Financing	\$0.0	\$0.0	\$0.0	\$0.0	\$0.0	\$0.0	\$0.0	\$0.0	\$0.0	\$0.0	\$0.0	\$0.0	\$0.0
Fees for Post-Petition Financing	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Legal Counsel Fees & Expenses	0.0	0.0	250.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
<b>Total Bankruptcy Related Fees</b>	<b>\$10.0</b>	<b>\$10.0</b>	<b>\$260.0</b>	<b>\$10.0</b>	<b>\$10.0</b>	<b>\$10.0</b>	<b>\$566.4</b>	<b>\$10.0</b>	<b>\$10.0</b>	<b>\$10.0</b>	<b>\$25.0</b>	<b>\$813.5</b>	<b>\$10.0</b>
<b>NET CHANGE IN CASH</b>	<b>(\$255.1)</b>	<b>(\$62.1)</b>	<b>(\$470.1)</b>	<b>\$11,621.1</b>	<b>(\$154.4)</b>	<b>(\$62.1)</b>	<b>\$27,388.2</b>	<b>\$5,466.6</b>	<b>\$10,988.5</b>	<b>\$23,865.8</b>	<b>\$765.3</b>	<b>(\$964.0)</b>	<b>\$5,563.8</b>
<b>CASH</b>													
Total Cash and Cash Equivalents at Beginning of Period	\$10,154.2 <sup>(a)</sup>	\$9,899.1	\$9,837.0	\$9,366.9	\$20,988.0	\$20,833.6	\$20,771.5	\$48,159.7	\$53,626.3	\$64,614.8	\$69,480.6	\$89,245.9	\$68,281.9
Pre-Petition Cash Payments	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Net (Decrease) Increase in Cash and Cash Equivalents	(255.1)	(62.1)	(470.1)	11,621.1	(154.4)	(62.1)	27,388.2	5,466.6	10,988.5	23,865.8	765.3	(964.0)	5,563.8
<b>Total Cash and Cash Equivalents at End of Period</b>	<b>\$9,899.1</b>	<b>\$9,837.0</b>	<b>\$9,366.9</b>	<b>\$20,988.0</b>	<b>\$20,833.6</b>	<b>\$20,771.5</b>	<b>\$48,159.7</b>	<b>\$53,626.3</b>	<b>\$64,614.8</b>	<b>\$89,480.6</b>	<b>\$89,245.9</b>	<b>\$88,281.9</b>	<b>\$93,865.7</b>

Notes:

(a) Cash Balance as of 4/12/06

# **EXHIBIT B**



## Debtor Bank Accounts

Company Name	Bank	Bank Account #	Account Type	Bank Phone #	Account Purpose
USA Capital Diversified Trust Deed Fund, LLC	Nevada State Bank	552016670	Analyzed Business Checking	(702) 383-0009	General Operating Account
USA Capital Diversified Trust Deed Fund, LLC	Nevada State Bank	85904514	Accessor US Govt MM Fund	(702) 383-0009	Money Market Account
USA Capital First Trust Deed Fund, LLC	Nevada State Bank	552024218	Analyzed Business Checking	(702) 383-0009	General Operating Account
USA Capital Realty Advisors, LLC	Community Bank of Nevada	10303691	CB Business Account	(702) 222-9800	General Operating Account
USA Commercial Mortgage Company	Wells Fargo	093-4610149	Choice IV Commercial Checking	(800) 225-5935	General Operating Account/Payroll
USA Commercial Mortgage Company-Exclusive Account	Wells Fargo	562788186	Basic Business Checking	(800) 225-5935	Pass-through Permanent Loans
USA Commercial Mortgage Company	LaSalle Bank	5800349150	Basic Business Checking	(312) 904-6100	Permanent Loan Brokers/Closing Fees
USA Commercial Mortgage Company	BankOne	634912067	Checking Trust for HMA	(800) 404-4111	HMA Investor Payments
USA Commercial Mortgage Company dba USA Capital	CitiBank	500078217	CitiBusiness	(877) 528-0990	Citibank Credit Line Interest Payment

# **EXHIBIT C**

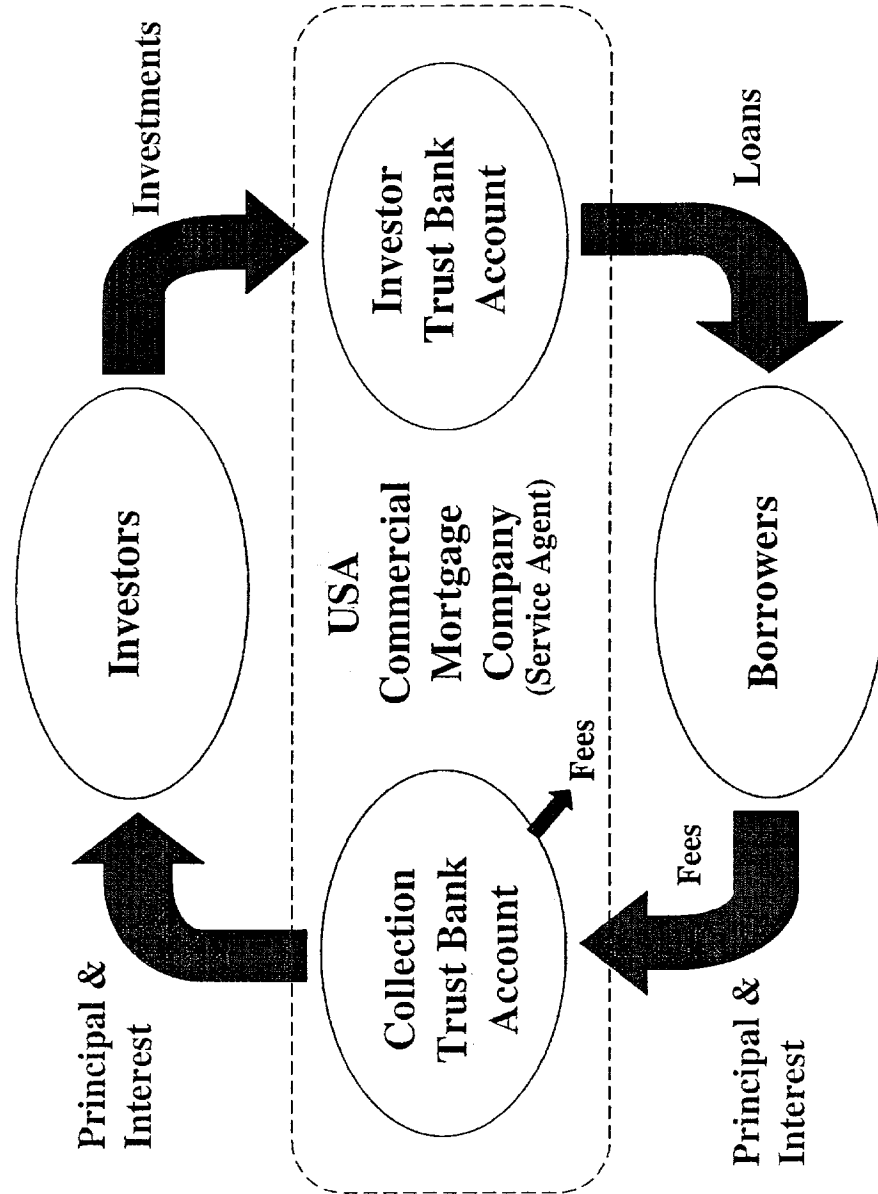


# USA Commercial Mortgage Company

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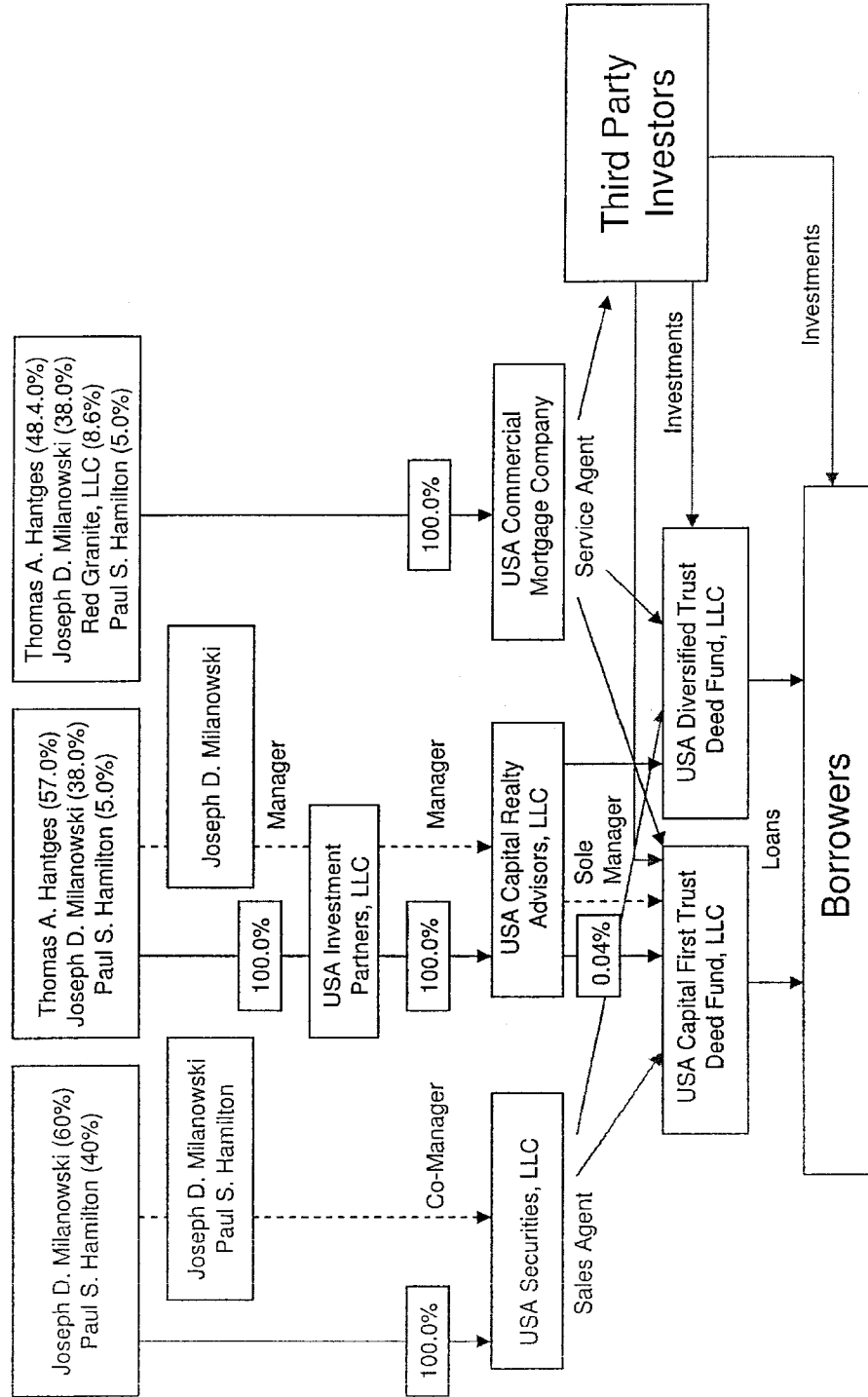
# USA Commercial Mortgage Company, Loan Servicing Cash Management System



Privileged and Confidential



# USA Commercial Mortgage Company



Privileged and Confidential

# **EXHIBIT “2”**

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Proposed Attorneys for Debtor and Debtor-in-Possession

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEVADA**

In re:

Case Nos. BK-S-06-10725-lbr

USA COMMERCIAL MORTGAGE  
COMPANY,

Chapter 11

Debtor.

**REPLY BRIEF IN SUPPORT OF MOTION  
FOR ORDER UNDER 11 U.S.C. §§ 105(a), 345,  
AND 363 APPROVING DEBTORS'  
PROPOSED CASH MANAGEMENT  
PROCEDURES AND INTERIM USE OF CASH  
IN ACCORDANCE WITH PROPOSED  
CASH BUDGET**

Hearing Date: May 3, 2006  
Hearing Time: 9:30 a.m.

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1 USA Commercial Mortgage Company (“USACM”), on behalf of itself and its affiliated  
 2 debtors, which are USA Securities, LLC, USA Capital Realty Advisors, LLC, USA Capital  
 3 Diversified Trust Deed Fund, LLC, and USA Capital First Trust Deed Fund, LLC (collectively,  
 4 the “Debtors”), submits this Brief in support of the Debtors’ Motion for Order Under 11 U.S.C. §§  
 5 105(a), 345, and 363 Approving Debtors’ Proposed Cash Management Procedures and Interim  
 6 Use of Cash in Accordance With Proposed Cash Budget (the “Motion”) and in reply to the  
 7 objections to the Motion that have been filed.

## 8 INTRODUCTION

9 The Debtors filed this Motion for permission to use cash collected by the Debtors in its  
 10 “Collection Account,” meaning the account in which payments from Borrowers are collected, in  
 11 accordance with and as limited by the Budget attached to the Motion, as modified in the Revised  
 12 Budget attached to the Supplemental Declaration of Thomas J. Allison (the “Supplemental Allison  
 13 Declaration”). For clarification, the money the Debtors collected pre-petition in the Investors  
 14 Account, meaning money that was collected to fund new loans, is not implicated by this Motion as  
 15 this Motion does not propose to use any cash held in that account.

16 As explained to the Court at the initial hearing, the 90-day Revised Budget is limited solely  
 17 to accomplishing two things. First, the Revised Budget includes costs, including professional and  
 18 attorneys fees, associated with administering the loan portfolio, including monitoring and  
 19 collecting monthly payments, negotiating and providing documentation necessary to collect these  
 20 payments, and taking all necessary enforcement actions on non-performing loans. The taking of  
 21 these actions are mandated by the Loan Servicing Agreements entered into between USACM and  
 22 each investor, and are necessary to preserve each investor’s rights in the loans in question.  
 23 Further, as set forth more fully below, the expenditures projected in the Revised Budget do not  
 24 exceed the sum of the servicing and other contractual fees and costs that the Debtors are allowed  
 25 to assess against and collect from the investors and the other amounts the Debtors are entitled to  
 26 collect directly from borrowers and other sources.

27 Second, the Revised Budget includes costs, including professional and attorneys fees,  
 28 associated with administering the case, including sorting out claims of investors in light of the fact



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that the past practice of the Debtors has been to make interest payments to all investors whether or not money was collected on the underlying loan. These practices have resulted in some investors being paid more than they were entitled to under their contracts and some investors being paid less than they were entitled to under their contracts. Because many individual investors invested in more than one loan and invested both in direct loans and through the USA Capital First Trust Deed Fund, LLC and the USA Diversified Trust Deed Fund, LLC (collectively the “Funds”), numerous investors fall into both the categories of having been both overpaid and underpaid with respect to the different loans in which they invested. Further, in order to keep up the interest payments, USACM, on many occasions, paid its own money to investors -- money that USACM was entitled to collect as servicing and other fees and costs and as to which it needs to now recover from investors that were wrongfully paid. It is critical that the Debtors make this analysis so that no money is paid post-petition to investors who are not entitled to receive the money and in order to preserve offset rights USACM has against investors both on its own account and for the account of other investors. The keeping of appropriate account records is required by the Loan Servicing Agreements entered into between USACM and each investor as part of servicing these loans, and such records are necessary to insure proper distribution of funds.

As set forth more fully below, the expenditures in the Revised Budget do not require USACM to use any funds collected on behalf of investors beyond the amounts it is entitled to retain by contract and by statute for servicing and related contractual fees and costs that the Debtors are allowed to assess against the investors, thus making this portion of the money collected clearly property of the estate under Section 541 of the Bankruptcy Code that can be used by the Debtors as requested in the Motion.

### STATEMENT OF FACTS

Every investor, including the Funds and investors investing directly or through the Funds, whether investing directly or through the Funds, signed a Loan Servicing Agreement with USACM. The Loan Servicing Agreement provides that USACM is authorized and instructed to “keep appropriate accounting records on each note and the sums collected thereon,” [LSA ¶ 2(b)], to “[p]roceed diligently to collect all payments due under the terms of the note and promptly pay

1 the proper parties, when and if due, principal, interest, late charges, insurance and other specified  
 2 funds,” [LSA ¶ 2(c)(i) (emphasis added)] , and to “[p]rovide the Lender with regular statements  
 3 regarding loan collections . . . .” [LSA ¶ 2(d)].

4 The Loan Servicing Agreement also requires USACM to “take steps to collect” payments  
 5 when “the Borrower fails to make any payment to USA.” [LSA ¶ 2(c) (ii)] This includes, but is  
 6 not limited to, authorization to obtain “representation for Lender in litigation and bankruptcy  
 7 proceedings as deemed necessary or appropriate by USA in its business judgment to fully protect  
 8 the interests of the Lender, *and of all Lenders in the loan.*” [LSA ¶ 2(c) (ii) (emphasis added)].

9 In paragraph 4, the Loan Servicing Agreement goes on to set forth the obligations and  
 10 rights of USACM in the event legal proceedings are instituted. This provision provides that legal  
 11 proceedings instituted under this agreement “may be pursued in USA’s name only or as agent for  
 12 Lender,” thus granting to USACM the sole standing to bring actions to collect on the loans in  
 13 question. [LSA ¶ 4] Further, USA is granted the right to “retain attorneys on Lender’s behalf”  
 14 and the investor (or “Lender”), “[u]pon demand by USA . . . agrees to promptly pay, either in  
 15 advance or to reimburse USA, for its pro rata portion of the out-of-pocket expenses incurred,  
 16 including attorney’s fees, trustee’s fees and foreclosure costs. In the event that Lender fails to pay  
 17 such sums to USA upon demand or request thereof, or if USA elects to advance such sums, USA  
 18 may, in its discretion, advance such fees, including trustee’s fees, attorney’s fees, and costs of  
 19 foreclosure; provided, however that any fees advance by USA shall be paid back from the  
 20 proceeds of the foreclosure (whether by reinstatement or sale), or from any other monies collected  
 21 with respect to such Loan before any payments are made to Lender.” [LSA ¶ 4].

22 In addition to the right given in paragraph 4 to require the investors to pay for the costs of  
 23 collection, including attorney’s fees, by payments directly to USACM or by offset against  
 24 amounts that would otherwise be payable to investors, the Loan Servicing Agreement provides for  
 25 an annual servicing fee to be paid to USACM. In paragraph 5, the Loan Servicing Agreements  
 26 provide, in addition to loan origination fees (that USACM is entitled to collect directly from  
 27 borrowers, along with certain other fees such as loan extension fees and exit fees), for an annual  
 28 servicing fee, payable on a monthly basis, which in some earlier Loan Servicing Agreements was

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1 stated as not to exceed 1% per annum of the maximum principal amount of each loan and in later  
 2 Loan Servicing Agreements was stated as not to exceed 3% per annum of the maximum principal  
 3 amount of each loan. [LSA, ¶ 5] While USACM had been collecting some servicing fees in the  
 4 past, prior to the bankruptcy petition date it was not collecting the full servicing fee to which it  
 5 was entitled. In some instances, it was not accruing or collecting any servicing fee, and in other  
 6 instances it was accruing only 0.5% or 1.0% of the loan balances but not collecting the accrued  
 7 amounts. In any event, USACM was not collecting the full amount of the annual loan servicing  
 8 fees it was entitled to collect under the Loan Servicing Agreements. A principal reason USACM  
 9 was not diligent in collecting loan servicing fees prior to the petition date was that in order to  
 10 make interest payments every month to all investors, USACM paid out what it was entitled to take  
 11 as a servicing fee to investors when not enough money was collected to make the interest  
 12 payments. Consequently, USACM has the right to collect the uncollected servicing fees from past  
 13 or future monies collected on behalf of those investors that have received overpayments from  
 14 USACM's own money. The Debtors' cash management motion proposes to use past due,  
 15 currently owed, and future servicing fees, which are property of USACM, along with enforcing its  
 16 right to hire attorneys and obtain payment or reimbursement of the same from the lenders, to fund  
 17 the operations of these Debtors in accordance with the Revised Budget.

18 Finally, paragraph 5 of the Loan Servicing Agreement also allows USA to keep all late  
 19 charges and default interest collected from the borrowers. As noted above, late charges are  
 20 referenced in paragraph 2(c)(i) with respect to USACM's obligation to make certain that the  
 21 amounts collected are paid to the "proper parties," which, because of paragraph 5, means  
 22 USACM. Paragraph 5 also allows USACM to assist lenders in finding potential buyers for their  
 23 interests and charge a 5% assignment fee based on the remaining balance of the lender's undivided  
 24 interest in the note, and to charge and keep all extension fees in the event an extension with a  
 25 borrower is negotiated. [LSA ¶5] These funds are also property of USACM and will be used to  
 26 fund the operations of these Debtors in these bankruptcy cases.

27 In addition to the fees allowed USACM under the Loan Servicing Agreements with  
 28 investors, USA Capital Realty Advisors, LLC ("USACRA") is entitled to be paid a monthly

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management fee pursuant to the Second Amended and Restated Operating Agreement of USA Capital First Trust Deed Fund, LLC (the “First Trust Deed Agreement”) and the Operating Agreement of USA Capital Diversified Trust Deed Fund, LLC (the “Diversified Trust Deed Agreement”). This fee amounts to an annual fee of 1% of the funds managed under the Diversified Trust Deed Agreement, and an annual fee of 1.5% of the funds managed under the First Trust Deed Agreement. As Manager, USACRA is required, under paragraph 3.1 of the First Trust Deed Agreement and under paragraph 3.01 of the Diversified Trust Deed Agreement, to “prosecute . . . compromise . . . or adjust any and all claims . . . for . . . the Company,” to “employ, at the expense of the Company, such agents, employees, independent contractors, attorneys, and accountants, as the Manager deems reasonable and necessary for any Company purpose, to “enforce loan documents” and to “retain such advisors and professionals . . . and do all other things that are, in the sole business judgment of the Manager, necessary or appropriate to effectuate any of the foregoing.” In accordance with this contractual right to collect this fee and in furtherance of its duties as the Manager of these two funds, the Revised Budget includes management fees paid by the Funds to USACRA from cash currently on hand, which is then contributed by USACRA to USACM to reimburse USACM for carrying out the duties of USACRA in enforcing and administering the loans in which the Funds are invested.

The Supplemental Declaration of Thomas J. Allison sets forth certain other relevant facts in support of this Motion and is incorporated by reference herein.

## ARGUMENT

### **I. FUNDS SUFFICIENT TO COVER THE REVISED BUDGET ARE PROPERTY OF USACM’S ESTATE AND MAY PROPERLY BE USED BY USACM IN ACCORDANCE WITH THE MOTION.**

Property of the estate includes “all legal or equitable interests of the debtor in property” as of the bankruptcy petition date. 11 U.S.C. § 541(a). While USACM in its capacity as loan servicer is holding and collecting certain funds on behalf of the loan investors, the portion of those funds representing the full contractual servicing fees and other fees which USACM is entitled to collect and funds which can be used to pay for attorneys fees and other costs of collection on the

1 non-performing loans clearly are property of the estate under Section 541(a) which can be used, in  
 2 accordance with Revised Budget, to administer the estate, enforce the loans, and create appropriate  
 3 accounting records for each note and the sums collected on each note, all of which is allowed and  
 4 required of USACM under the Loan Servicing Agreements.

5 In the case of *In re Mortgage Funding Inc.*, 48 B.R. 152 (Bankr. Ct. D. Nev. 1985), the  
 6 Court denied motions for relief from the stay brought by investors who funded loans to borrowers  
 7 serviced by the debtor, a mortgage broker. In that case, the debtor was entitled to “retain” the  
 8 “difference between the higher return on the assigned note and the lower return on the new note”  
 9 as a “servicing fee.” *Id.* at 153. The Court found that the “debtor has an interest in the assigned  
 10 notes and deeds of trust” to the extent that “servicing fee” and that “the debtor’s limited interest in  
 11 the assigned notes and deeds of trust passed to the debtor’s estate on the date the petition was  
 12 filed.” *Id.* at 155-156. Consequently, the Court held that “the trustee shall retain the difference  
 13 between the amounts collected on the assigned notes and the amounts paid on the notes issued by  
 14 the debtor, for the benefit of the estate.” *Id.* at 156.

15 In connection with the Motion, the Debtors are asking for permission to use funds  
 16 collected on behalf of investors only to the extent of the “debtor’s limited interest” in the funds  
 17 collected. This money is property of the estate pursuant to Section 541(a) and is properly used for  
 18 administrative and collection purposes as proposed in the motion. Moreover, USACM has other  
 19 sources of funds, including deferred loan origination fees for loans closed pre-petition (USACM  
 20 has not originated any new loans since the petition date and will not do so without Court approval)  
 21 and other loan fees, such as loan extension fees and loan exit fees, that USACM is entitled to  
 22 collect directly from borrowers. One of the Debtors, USA Capital Realty Advisors, is also entitled  
 23 to charge its contractual management fee to the two Funds it manages, as explained above. The  
 24 Revised Budget proposes to use approximately \$4.2 million in cash over a three-month period.  
 25 When combined with the Debtors’ sources of funds other than those collected on behalf of the  
 26 loan investors, the monthly loan servicing fee of 1/12 of 1% or 3% of the outstanding loan  
 27 balances which USACM is entitled to retain from loan payments it collects as loan servicer is  
 28 adequate to cover the expenditures set forth in the Motion and Revised Budget. As such, the

1 Motion seeks to use only what is clearly property of the Debtor's estate and should be granted.

2 **II. THE RELIEF REQUESTED IN THE MOTION IS CONSISTENT WITH THE**  
 3 **NEVADA STATUTE GOVERNING TRUST FUNDS HELD BY MORTGAGE**  
 4 **BROKERS.**

5 Even if the funds in question are eventually determined to be funds held in trust by  
 6 USACM as a mortgage broker under Nev. Rev. Stat. § 645B.175, the use of cash as requested in  
 7 the Motion complies with that statute. Nev. Rev. Stat. § 645B.175 (5) (a) provides that monies  
 8 held in trust by a mortgage broker must be released to investors only after "the deduction and  
 9 payment of any fee or service charge due the mortgage broker." Thus, as this statute applies  
 10 under the current circumstances, the statute acknowledges and allows for USACM, as the  
 11 mortgage broker, to take money out of the collection account to pay its own contractually allowed  
 12 fees and charges. Since USACM is not seeking by its Motion to use any monies USACM has  
 13 collected as loan servicer on behalf of loan investors other than the statutorily allowed amounts,  
 14 the relief requested in the Motion complies with the statute.<sup>1</sup>

15 **III. REPLY TO SPECIFIC OBJECTIONS FILED.**

16 Several objections to the Motion have been filed as of May 1, 2006, and others may be  
 17 filed. The Loan Investors and/or Fund Members making the objections appear to fall into two  
 18 main categories: (1) investors claiming a right to funds in the USACM "Investors Account" (funds  
 19 which the Debtors are *not* seeking to use pursuant to the Motion) due to certain recent assignments  
 20 made just prior to the Petition Date of certain interests in Serviced Loans; and (2) investors who  
 21 have an interest in one or more Nonperforming Loans who actually owe money to USACM for  
 22 monthly overpayments they received from USACM to which they were not entitled. Each of the  
 23 \_\_\_\_\_

24 1 While this will be addressed in more detail in the Debtors' Motion to Temporarily Hold All Funds Pending a  
 25 Determination of the Proper Recipients, the Debtors would further note that Nev. Rev. Stat. § 645B.175 (5)(b) also  
 26 prohibits a mortgage broker from releasing money held in trust to "any investor who owns a beneficial interest in the  
 27 loan, unless the amount described in paragraph (a) is also released to every other investor who owns a beneficial  
 28 interest in the loan." Thus, while objections raised by individual investors to the Motion argue for an immediate  
 distribution of funds held on account of their fractionalized interests in a loan, under this statute, such a distribution  
 cannot be made until distributions can be made to every investor in a loan, including to investors owing money to the  
 estate for prior improper distributions and to the Funds as investors.



specific objections that appears on the Court's docket in the USACM case as of May 1, 2006 is addressed briefly below. The status of a particular loan as performing or nonperforming, the amount of interest in arrears, and other information about specific loans referred to below, is given in the spreadsheet attached as Exhibit A to the Supplemental Allison Declaration.

1. Alexander Objection. Pursuant to an objection filed April 25, 2006, the Stanley Alexander Trust, Stanley Alexander, and Florence Alexander (collectively, the "Alexanders") assert that they invested approximately \$1.8 million in loans brokered or to be brokered by USACM. Apparently, \$100,000 of those funds was invested in a check that cleared the day before the Petition Date. To the extent any of the Alexanders' funds invested prior to the Petition Date was in USACM's "Investors Trust" account on the Petition Date, the Alexanders' objection is not a proper objection to the Motion. As explained above and in the Motion, the Debtors' Motion does not request authority to use any of the funds held in the "Investors Trust" account as of the Petition Date, and USACM will continue to hold such funds pursuant to Nevada state law and other applicable law pending a determination by this Court as to the proper disposition of such funds. To the extent the Alexanders' objection alleges that USACM has no interest in loan payments collected by USACM on loans in which they may have a small fractional interest, and that the promissory notes should be released to them for collection, the objection lacks merit. As explained above, USACM has a contractual right as well as a contractual and statutory duty to service the loans on behalf of Alexanders and all other Loan Investors holding fractional interests in those same loans, and the contractual servicing fee and other fees to which USACM is entitled to collect from Alexanders and others under the LSAs is property of USACM's bankruptcy estate. Furthermore, of the loans listed on Exhibit E to the Alexanders' objection, the following are currently Nonperforming Loans: (1) Marquee Hotel Palms; (2) Placer Vineyards; (3) One Point St., LLC (aka "HFA – North Yonkers"); (4) Roam Investment (Development); (5) Rivera Homes; and (6) HFA – Clear Lake. Thus, to the extent the Alexanders received interest payments to which they were not entitled on their investments in Nonperforming Loans, they owe a debt to USACM for the overpayments.

2. Benincasa Objection. Focerfida Benincasa and Jasper Benincasa Jr. (the

“Benincasas”) filed an objection on April 27, 2006. Apparently, the Benincasas made their one and only investment through USACM by investing \$110,000 with a check deposited to USACM’s “Investors Trust” account that cleared one day prior to the Petition Date. As stated above, to the extent the funds were in the “Investors Trust” account on the Petition Date, the Benincasas’ objection is not a proper objection to the Motion.<sup>2</sup> To the extent the funds were invested in one of the Serviced Loans as of the Petition Date, USACM is entitled to charge the servicing fee and other fees set forth in the LSA, and such amounts are property of the estate.

3. Objection of Sandler, Gackebach, Steins, and Rowley. An objection to the Motion was filed April 27, 2006 by the Sandler Revocable Trust (“Sandler”), Gackebach Revocable Trust and David Gackebach IRA (collectively, “Gackebach”), Susan Stein Trust and Susan Gackebach IRA (collectively, “Susan Stein”), various Jay Stein trusts and IRA (collectively, “Jay Stein”), and the Rowley Living Trust (“Rowley”). In the objection, the objectors admit that USACM is entitled to use funds for the purposes set forth in the Motion to the extent of the servicing fee USACM is entitled to collect. This is all that is sought in the Motion. Further, the objection argues that what “should be Debtors’ first and most immediate priority is determining the performing or non-performing status of each loan in the portfolio.” Objection at 3. This is exactly what USACM is doing, and is part of the budgeted amount and part of the services contemplated under the LSAs for which USACM is entitled to collect its contractual fees. In fact, USACM has determined that the objectors, who each signed a Declaration that is part of the Exhibit A attached to the objection, have each invested in at least one Nonperforming Loan and thus may owe a debt to USACM for interest overpayments. The Nonperforming Loans referred to in the objectors’ Declarations include: (1) Shamrock Tower, LP (which is \$1.5 million

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2 USACM is aware that approximately \$1.9 million in new funds from investors was deposited into the “Investors Trust” account shortly before the Petition Date, and that such funds were intended to be used to purchase assignments of interests in some of the Serviced Loans that certain Loan Investors desired to sell and assign. Apparently, the Petition Date intervened after the assignment documents were executed and the checks were issued to the sellers/assignors but before the checks cleared. USACM understands that the assignees (such as, apparently, the Alexanders and the Benincasas) and the assignors (such as the Ronnings, as discussed below) may have competing claims to the funds in the “Investors Trust” account. USACM will not disburse any funds from that account until the competing claims are determined by the Court.



1 in arrears); (2) Gramercy Court Ltd. (\$750,000 in arrears); (3) Palm Harbor One, LLC (\$20,000  
 2 arrearage); (4) Fox Hills 216, LLC (\$299,000 arrearage); (4) Fox Hills 185, LLC (\$675,000  
 3 arrearage); (5) Oak Mesa Investors, LLC (\$3.6 million arrearage); and (6) Marlton Square  
 4 Associates, LLC (\$975,000 arrearage).

5 4. Objection of Buckalew Trust and Higgins Trust. The Buckalew Trust and  
 6 Higgins Trust filed an objection on April 28, 2006. The objectors falsely alleged that the relief  
 7 requested in the Motion violates Nevada mortgage broker laws (Nev. Rev. Stat. §§ 645B.165 to  
 8 .175), and that the Motion seeks in effect “the Court’s blessing to continue violating Nevada law  
 9 post-petition.” Objection at 8. To the contrary, the Motion clearly explains that under the  
 10 Debtors’ cash management proposal, payments collected on Serviced Loans will go in to the DIP  
 11 Collection Account and remain segregated there from any amounts belonging to USACM and  
 12 from any amounts received for new investments (if any) with USACM, all in full compliance with  
 13 Nev. Rev. Stat. § 645B.175(4). Under the statute and to the extent approved by this Court  
 14 pursuant to the Motion, USACM is then entitled to deduct and transfer to its DIP Operating  
 15 Account (as requested in the Motion) the full amount of “any fee or service charge due to the  
 16 mortgage broker.” *Id.* § 645B.175(5). The objection acknowledges that USACM is entitled to  
 17 use “monies . . . for any loan servicing fees” pursuant to the Motion. *See* Objection at 9. As  
 18 explained above, the limited amounts set forth in the Revised Budget do not exceed the contractual  
 19 servicing fees to which USACM is entitled under the LSAs. Moreover, the Buckalew Trust is  
 20 invested in the One Point Street, LLC loan (aka “HFA-North Yonkers”), which is a  
 21 Nonperforming Loan having approximately \$3.7 million in unpaid interest due as of March 31,  
 22 2006. Thus, the Buckalew Trust may owe a debt to USACM for the monthly payments of interest  
 23 to which the Buckalew Trust was not entitled. The objection does not indicate what investment  
 24 was made by the Higgins Trust and, as Merisow has not yet completed its work in preparing  
 25 investor-by-investor account reconciliations, USACM cannot at this time readily determine  
 26 whether the Higgins Trust invested in any Nonperforming Loans.

27 5. Eight Separate Objections Filed May 1, 2006 by Attorney Robert LePome for  
 28 Various Investors. On May 1, 2006, attorney Robert LePome filed eight separate objections on

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1 behalf of various investors, including Richard Williams, Carole Talan, and Hans Prakelt (USACM  
 2 docket no. 94); Church of the Movement of Spiritual Inner Awareness (docket no. 95); Nancy  
 3 Golden (docket no. 96); Marilyn Molitch, Matthew Molitch, and Molitch 97 Trust (docket no. 97);  
 4 Phillips Family Trust, Frances Phillips, and Stephen Phillips (docket no. 98); Spectrum Capital,  
 5 LLC (docket no. 99); Bosworth Family Trust, Crosbie Ronning, Wild Water Ltd. Partnership, and  
 6 Grable Ronning (docket no. 100); and Patrick Davis IRA, Susan Davis, and Patrick Davis (docket  
 7 no. 101). It appears that each of these objections raises similar legal issues, although USACM has  
 8 not yet had time to review in detail these objections to determine that status of the investments  
 9 made by these investors. The form of these objections is nearly identical to the Alexanders'  
 10 objection discussed above, which was also filed by attorney Robert LePome, and it appears that at  
 11 least some of these objectors have both fractional interests in Serviced Loans as well as claims to  
 12 funds held in the "Investors Trust" account, as the Alexanders do. However, there is an important  
 13 distinction between the Alexanders' position (and that of the Benincasas, above) and the position  
 14 of the Ronnings (and possible others of these May 1, 2006 objections): while the Alexanders have  
 15 a claim on the "Investors Trust" account based on their status as an assignee/purchaser of a  
 16 fractionalized loan interest just prior to the Petition Date, the Ronnings apparently have a claim on  
 17 the same "Investors Trust" account based on their status as an assignor/seller of a fractionalized  
 18 loan interest just prior to the Petition Date. Although, as noted above in connection with the  
 19 Alexanders' and the Benincasas' objections, the competing claims to the funds in the "Investors  
 20 Trust" account are not relevant in considering the relief requested by the Motion, the competing  
 21 claims of Mr. LePome's clients do highlight a conflict of interest between assignees and assignors  
 22 of loan interests having competing claims on the "Investors Trust" account. USACM will attempt  
 23 to determine the status of the loan interests held by the investors objecting in these eight  
 24 objections and present such information at the hearing on the Motion.

25 Each of Mr. LePome's clients also attempts in the objections to unilaterally terminate the  
 26 powers of attorney appointing USACM to act with regards to their individual investments. These  
 27 powers of attorney give USACM specific valuable rights and should be considered as property of  
 28 the estate. *Computer Communications, Inc. v. Codex Corp. (In re Computer Communications,*

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*Inc.*), 824 F.2d 725, 729 (9th Cir. 1987) (although the definition of property under Section 541 neither explicitly includes or excludes contract rights, the definition does include "all legal or equitable interests of the debtor in the property as of the commencement of the case." )(quoting 11 U.S.C. §541(a)(1)); *see also In re Minoco Group of Companies, Ltd.*, 799 F.2d 517, 519 (9th Cir. 1986) (holding that insurance contracts are also considered to be property of the estate). Because the powers of attorney should be considered as property of the estate, the objecting parties' efforts to unilaterally terminate them are a violation of the automatic stay. *See Codex*, 824 F.2d at 731 ("Codex violated the automatic stay statute by terminating its contract unilaterally rather than applying for relief from the bankruptcy court."); *see also In re Bobbit*, 174 B.R. 548, 554 (Bankr. N.D. Cal. 1993) ("[U]nilateral termination of a contract by a creditor requires relief from the automatic stay."). Actions in violation of the stay are void. Moreover, even if objectors could properly terminate their powers of attorney granted to USACM, the servicing rights they granted to USACM under their Loan Servicing Agreements are similar to (but broader than) those addressed in the power of attorney agreement, and cannot be terminated without 30 days' advance notice.

6. Objection by Attorney Janet Chubb on Behalf of Unidentified Investors. On May 1, 2006, attorney Janet Chubb filed an objection to the Motion on behalf of "numerous direct lenders who are named beneficiaries . . . of certain loans which were originated and serviced" by USACM. Objection at 1. In form and substance, the objection is similar to other objections discussed and responded to above. Furthermore, the objection fails to reveal the names of any of Ms. Chubb's clients on whose behalf the objection is filed. In addition, it does not appear that Ms. Chubb has filed with the Court the verified statement required by Fed. R. Bankr. P. 2019(a) when an entity or committee (other than an official committee appointed under 11 U.S.C. § 1102 or 1114) is representing more than one creditor or equity security holder. The objection does indicate that the numerous (but unidentified) objectors represented by Ms. Chubb "use David A. Souza's loan in the Oak Mesa project as a representative example of the loan process." Objection at 2. Although it is not clear whether David A. Souza is in fact one of the numerous objectors represented by Ms. Chubb, USACM has determined that the Serviced Loan in which Mr. Souza



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not be able to promptly and adequately protect their fractionalized interests, the majority of which appear to be in non-performing loans. This problem is highlighted by the fact that virtually all of the investors objecting to this Motion have invested in non-performing loans, which need the immediate servicing and collection attention of USACM in order for their rights to be preserved. Further, in the Loan Servicing Agreement, each individual investor recognized and, in essence, agreed to not advance their fractionalized interest in a loan in a way that would harm the other owners of the loan. All investors agreed that only USACM, not any of them individually, could sue on behalf of all owners of the loan. All investors agreed that attorneys could be retained where as may be deemed “necessary or appropriate by USA” to fully protect the interests” not only of themselves as a Lender, but “of all Lenders in the loan.” This agreement on the part of the investors is in accordance with the prohibition found in Nev. Rev. Stat. § 645B.175 (5) (b), which requires equal treatment of all investors in a loan with respect to distributions allowed. Protecting the interests of “*all Lenders*” in each loan is exactly what USACM is proposing to do under the Motion and Revised Budget in accordance with its contracts and *out of its own money*. USACM should be allowed to do so over the objections of a minority of investors, allegedly holding fractionalized interests of some of these loans, where the claims of these investors to proceeds of

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1 the loans, net of USACM's contractually entitled fees, is not being affected. To do otherwise  
2 severely prejudices the silent majority of investors whose rights, along with the vocal minority, are  
3 being fully protected by USACM in accordance with their contracts and Nevada law.

4 DATED this 2<sup>nd</sup> day of May, 2006.

5 Annette W. Jarvis, Utah Bar No. 1649  
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and

10 /s/ Jeanette E. McPherson

11 Lenard E. Schwartzer, Esq.

12 Jeanette E. McPherson, Esq.

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16  
17 Proposed Attorneys for Debtor and Debtor-In-  
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